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8 LEON EUGENE MORRIS,
9 Plaintiff,
10 v.
11 D.A. TRAVIS, et al.,
12 Defendants.
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15 Case No. [10-cv-04010-WHO \(PR\)](#)
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ORDER OF DISMISSAL

18 Dkt. No. 41
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INTRODUCTION

23 Defendants move to dismiss as untimely plaintiff Leon Morris's civil rights suit
24 which he brought pro se under 42 U.S.C. § 1983 against his former jailors at Salinas
25 Valley State Prison. The motion is unopposed. A response to this motion was due several
months ago, on July 6, 2015, but Morris has neither filed an opposition nor requested any
extension of time to file one.

Defendants are correct that Morris's decade-old claims are barred by the statute of
limitations, even when time for equitable tolling is taken into account. Accordingly, the
motion to dismiss is GRANTED, and the action is DISMISSED.

BACKGROUND

Morris's original complaint alleged 19 quite varied claims (excessive force,
deprivation of due process, deliberate indifference, withholding mail) against 36

1 defendants at Salinas Valley State Prison regarding events that occurred in 2004 and 2005.
2 In its screening order, the Court dismissed without prejudice all but Morris's claim that in
3 June 2004, correctional officers R. Pastor and Sztukowski used excessive force against
4 Morris, and officer Hubbard failed to intervene.

5 Morris, who is serving a term of life with the possibility of parole, attempted to
6 raise these same claims in three prior actions, one in 2005 and the other two in 2007 and
7 2008. *See Morris v. Woodford*, No. C 05-4677 MJJ, *Morris v. Woodford*, No. 07-4198
8 MJJ, and *Morris v. Woodford*, No. C 08-3435 SI. These prior attempts were unsuccessful.
9 In the first two cases, the Court denied Morris's pauper application because he had filed at
10 least three prior actions that had been dismissed as frivolous or malicious, or for failure to
11 state a claim, and dismissed the action without prejudice to Morris bringing those claims in
12 an action for which he paid the full filing fee. In the 2008 case, the Court dismissed
13 Morris's claims against Pastor, Sztukowski, Hubbard because they were not properly
14 joined, and later dismissed the suit for failure to serve process. (Defs.' Mot. to Dismiss
15 ("MTD") at 3-4.)

16 The dismissal in the 2005 case was affirmed on appeal in Ninth Circuit Case
17 No. 06-15869. The appeal of the 2007 was dismissed in Ninth Circuit Case No. 08-15956.
18 Morris did not appeal the 2008 dismissal. (*Id.* at 4.)

19 DISCUSSION

20 Defendants contend that Morris's suit under section 1983 is barred by the statute of
21 limitations.

22 Section 1983 takes its limitations period from the forum state's statute of limitations
23 for personal injury torts, *see Wilson v. Garcia*, 471 U.S. 261, 276 (1985), which, in
24 California, is two years as of 2003, *see Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir.
25 2004); Cal. Civ. Proc. Code § 335.1. This two-year statute of limitations period is tolled
26 for two years if the plaintiff is a prisoner serving a term of less than life, giving such
27 prisoners effectively four years to file a federal suit. *See Cal. Civ. Proc. Code § 352.1(a);*
28 *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) (federal courts borrow the state's

1 California's equitable tolling rules if they are not inconsistent with federal law). A
2 prisoner serving a term of life with the possibility of parole, such as Morris, is considered a
3 prisoner serving a term of less than life. *Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir.
4 1998). The statute of limitations starts to run when the plaintiff's claim has accrued, that
5 is, when he knows or has reason to know of the injury that is the basis of his action. *Two
6 Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1998).

7 Morris's claims are barred by the statute of limitations. His claim accrued, and the
8 statute of limitations started running, in June 2004 when the prison guards allegedly used
9 excessive force on him. He was entitled to four years (the sum of the time allowed by the
10 usual limitations period and equitable tolling under section § 352.1) from that time to file
11 suit because he is a prisoner serving a term of life with the possibility of parole. This
12 means that he had until June 30, 2008, at the latest, to file suit. The suit was not filed until
13 2010, which is well after the 2008 deadline.

14 Morris's prior lawsuits do not toll the statute of limitations under either state or
15 federal law. California treats an action dismissed without prejudice as if "no action has
16 been brought," unless a statute specifies otherwise. *Wood v. Elling Corp.*, 20 Cal.3d 353,
17 359 (1977). In an appropriate case, however, the statute of limitations might be tolled for
18 time spent pursuing a remedy in another forum (such as state court) before filing the claim
19 in federal court. *Cervantes v. City of San Diego*, 5 F.3d 1273, 1275 (9th Cir. 1993)
20 (quoting *Addison v. California*, 21 Cal. 3d 313, 317 (1978)) (equitable tolling "reliev[es]
21 plaintiff from the bar of a limitations statute when, possessing several legal remedies he,
22 reasonably and in good faith, pursues one designed to lessen the extent of his injuries or
23 damage.") Morris's action does not fall under this exception because he did not pursue his
24 remedies in another forum before filing his federal suits.

25 Federal law provides no relief for Morris because his prior lawsuits were dismissed
26 without prejudice, enabling him to refile at any time. "[I]f the suit is dismissed without
27 prejudice, meaning that it can be refiled, then the tolling effect of the filing of the suit is
28 wiped out and the statute of limitations is deemed to have continued running from

1 whenever the cause of action accrued, without interruption by that filing.” *Elmore v.*
2 *Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000); *O'Donnell v. Vencor, Inc.*, 466 F.3d
3 1104, 1111 (9th Cir. 2006) (citing with approval *Chico-Velez v. Roche Prods., Inc.*, 139
4 F.3d 56, 59 (1st Cir. 1998), which cited eight federal circuits for the rule that the statute of
5 limitations is not tolled when a complaint containing the same claims as a later suit is
6 dismissed without prejudice).

7 **CONCLUSION**

8 Defendants’ motion to dismiss (Docket No. 41) is GRANTED and this section 1983
9 suit is DISMISSED with prejudice.

10 The Clerk shall terminate Docket No. 41, enter judgment in favor of defendants,
11 and close the file.

12 **IT IS SO ORDERED.**

13 **Dated:** November 12, 2015



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15 WILLIAM H. ORRICK
16 United States District Judge
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